ABSTRACTS

[Editor's note: The abstracts section is a new feature of the *Journal*. It contains summaries of recent articles, comments and notes discussing alternative forms of dispute resolution published in law journals not specializing in ADR. In addition, the section lists citations to recent articles of interest that are not summarized.]

Trino Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991). Professor Grillo argues that mandatory divorce mediation is steeped in a patriarchal legal paradigm and is therefore, not superior to traditional adversarial processes for female parties. The author concludes that the dangers of divorce mediation to women are such that it is inappropriate for states to have mandatory divorce mediation laws. The author supports her thesis by analyzing child custody disputes under the California mandatory mediation law. Grillo identifies the potential, but unfulfilled, advantages of mediation in this setting as follows: mediated agreements can take context into account in a way that litigated divorces cannot. Mediation also provides an outlet for the expression of emotions that is healthy in the divorce context. Finally, mediation gives the parties an opportunity to tailor the settlement to their own needs. The author argues that divorce mediations do not realize these potential advantages because both male and female mediators prevent women from expressing concerns that are not recognized by the patriarchal paradigm of the law that the courts embody. Grillo concludes that mediation should not be mandatory but rather it should only be undertaken in the divorce setting if both parties consent to the mediation after being educated about its limits and dangers.

Ian Ayers, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991). Although civil rights laws prohibit gender and race discrimination in the areas of employment, housing, and public accommodations, disparate treatment against women and minorities is still prevalent in negotiations for the purchase price of an automobile. The author asserts that legislation already in existence does not prevent disparate treatment of women and minorities who contracted to buy and sell goods and services. To prove disparate treatment in automobile price negotiations, Ayers conducted a comprehensive statistical analysis involving car retailers in the Chicago area and white male, white female, black male, and black female subjects.

His test results reveal that white males receive the lowest possible final offer, indicating price discrimination. He also concluded that white males do not experience disparate treatment in non-price dimensions of the bargaining process, as was demonstrated by use of different questions and different techniques based on the physical characteristics of the buyer. Ayers asserts three possible theories explaining why dealers discriminate: animus-based discrimination, cost-based statistical discrimination, and revenue-based statistical discrimination. He finds that revenue-based statistical discrimination, which declares that dealers make inferences about how much consumer groups on average are willing to pay for a car at a particular dealership, best explains the disparate treatment. Ayers postulates that in order to prevent revenue-based statistical discrimination, any one or a combination of the following recommendations could be adopted: amend current civil rights laws, strictly enforce consumer protection laws at the state and federal levels, or institute various regulatory reforms to eliminate disparate treatment.

C. Evan Stewart, *Securities Arbitration Appeal: An Oxymoron No Longer?*, 79 KY. L.J. 347 (1990/1991). The right of appeal is an important part of the American civil litigation system. Since civil litigation is rapidly being replaced by arbitration, the author asserts that courts should be empowered to review arbitration awards. The author notes that there is both statutory and common law support for judicial review of securities arbitration decisions. He points out that Sections 10 and 11 of the Federal Arbitration Act provide for vacation, modification, or correction of arbitration awards presented to a court for confirmation. According to the author, these sections impliedly provide a basis for the appeal of arbitration decisions. The author also indicates that the common law doctrine of "manifest disregard of the law," was intended to provide a standard for the review of arbitration awards. While noting that few lower courts have chosen to adopt this "manifest disregard" standard as a basis for judicial review, Stewart nonetheless argues that the United States Supreme Court intended the standard for this purpose. He contends that the recent U.S. Supreme Court holding that arbitrators are bound to research and follow applicable law is evidence that the Court intended arbitration decisions to be appealable. The author next examines the effect that this holding has had on the lower courts, and he concludes that more courts are actually reviewing arbitration awards and that they are doing so on such nonstatutory grounds as ambiguity, capriciousness, lack of factual support, and public policy. The author advocates that securities arbitrants' right of appeal must be broadened in order to protect substantive rights. He emphasizes the complexity of securities law and that laypersons are interpreting this law. He also points out that absolutes

defenses, such as the statute of limitations, are rarely recognized by arbitrators. Finally, Stewart argues that the only way to prevent impermissably large damage recoveries is to make them reviewable by the courts of law.

Jonathan Brock, *Mandated Mediation: A Contradiction in Terms: Lessons from Recent Attempts to Institutionalize Alternative Dispute Resolution Practices*, 2 VILL. ENVTL. L. REV. 57-87 (1991). This article examines the conditions, features and ingredients which contribute to the successful development and operation of institutionalized alternative dispute resolution systems. These systems are negotiation and mediation for the purpose of resolving similar types of disputes. They also are characterized by certain formalities including operation by statute or other regulatory means.

Brock concentrates on four case studies involving government attempts to create institutionalized alternative dispute resolution mechanisms to resolve recurring disputes.

Using these four cases as a reference, Brock identifies the obstacles to developing and implementing institutionalized systems of dispute resolution. Barriers include obtaining from the parties who are directly and indirectly affected by the dispute. Likewise, a rigid and institutionalized system is unlikely to conform to the specific needs of the individual parties. Accordingly, the article suggests that in many situations a site-specific dispute resolution mechanism, employed by the parties with an immediate interest in the dispute, will produce more efficient results.

Although the author recognizes the difficulties in creating institutionalized systems of dispute resolution, he strongly encourages efforts by governmental entities to experiment with creating such mechanisms to resolve recurring disputes. The author then details a tentative set of guidelines concerning the establishment, structuring and operation of a workable institutionalized alternative dispute resolution system. The article concludes with a pragmatic analysis of whether problems inherent in an institutionalized system can be overcome. The author suggests that the establishment of generic systems should be embarked on cautiously and the basic principles of site-specific dispute resolution should not be sacrificed in establishing an institutionalized mechanism.

Leonard F. Charla and Gregory J. Parry, *Mediation Services: Successes and Failures of Site-Specific Alternative Dispute Resolution*, 2 VILL. ENVTL. L.J. 89-97 (1991). Alternative dispute resolution principles

have been employed with varying degrees of success by potentially responsible parties (PRPs) in cleaning up hazardous waste sites mandated by the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA" or "Superfund"), 42 U.S.C. §§ 9601-9675 (1988). The authors contend that ADR techniques, if properly utilized, can be effective in solving problems between PRPs at Superfund sites. They note ADR has come into more frequent use in environmental disputes. The authors analyze the procedural and substantive provisions of CERCLA, concluding that PRPs should resolve liability issues among themselves to avoid being brought into court. Charla and Parry propose the use of multi-party PRP steering committees and suggest these committees utilize ADR techniques to resolve allocation of liability and other problems facing PRPs. The authors proceed to discuss both the advantages and disadvantages of using ADR at Superfund sites. They provide examples of how third party neutrals, common counsel, and independent counsel have been effectively and ineffectively employed to facilitate steering committees in resolving issues between PRPs. The authors conclude that application of appropriate ADR techniques for Superfund problem-solving must be done on a case-by-case basis to take into account differing fact situations at clean-up sites and differing needs of steering committees.

Note, *The Agreements to Arbitrate Claims Under the Age Discrimination in Employment Act*, 104 HARV. L. REV. 568 (1990). The author argues that the Supreme Court's opinions endorsing arbitration allow arbitration to be used to resolve disputes under the Age Discrimination in Employment Act ("ADEA") of 1967. The author asserts that a shift to arbitration of ADEA claims would benefit both employees and employers. However, the author also believes employees would be harmed unless Congress establishes minimum standards by which the Equal Employment Opportunity Commission ("EEOC") could monitor ADEA arbitration. The author points out that although the Supreme Court has expanded the role of arbitration by allowing arbitral decisions of claims involving statutory rights, it has not extended its reasoning to employment discrimination statutes. He argues that the *Nicholson v. CPC International Inc.* case inappropriately used the *Shearson/American Express, Inc. v. McMahon* "inherent conflict" test to decide that ADEA disputes may not be bound to arbitration. The author asserts that it is inappropriate for a court to decide that some statutes are more important than others and therefore, should be reserved for judicial scrutiny. The author argues that the following benefits would result from arbitration of ADEA claims: greater affordability, and, thus, greater access for persons raising ADEA claims; the lessening of antagonism

achieved by arbitration if equitable relief such as continued employment is sought; and confidentiality provided to both employees and employers. The author sees that the difficulty of proving age discrimination given the limited discovery available in arbitration may make it inappropriate for ADEA claims. He argues that by allowing a "control group" of ADEA cases to be submitted to arbitration, with congressional monitoring guidelines provided to EEOC, the benefits of arbitration could be realized while detriments to employees could be ameliorated.

Hope H. Camp, Jr., *Binding Arbitration: A Preferred Alternative for Resolving Commercial Disputes Between Mexican and U.S. Businessmen*, 22 ST. MARY'S L.J. 717-752 (1991). Binding arbitration offers the best alternative for the resolution of commercial disputes that arise out of private commercial relationships between Mexican and U.S. businessmen. The author contends that because of the increase in trade relations between the United States and Mexico since the 1980's, a need has developed for a mutually satisfactory forum for resolving private commercial disputes. He discusses a variety of differences between the two legal systems and demonstrates why American and Mexican businessmen are dissatisfied with the prospect of facing a foreign forum. Differences exist in both the substantive and procedural rights, leading to substantial uncertainty in the minds of businessmen as to whether a dispute will be resolved definitively or fairly. The author examines two international treaties which create a foundation for binding international arbitration. After a brief discussion of the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the Inter-American Convention on International Commercial Arbitration of 1975 (Panama Convention) the author describes the advantages of binding arbitration over judicial resolution of commercial disputes between foreign business entities. Ad hoc and institutional arbitrations are examined as two general frameworks in which these treaties operate. The author examines essential considerations in drafting an arbitration agreement and analyzes specific instances in which an arbitration agreement is the preferred method for dispute resolution.

ADDITIONAL ARTICLES OF INTEREST

Bundy and Elhauge, *Do Lawyers Improve the Adversary System? A General Theory of Litigation Advice and Its Regulation*, 79 CALIF. L. REV. 315 (1991).

Charla and Parry, *Mediation Services: Successes and Failures of Site-Specific Alternative Dispute Resolution*, 2 VILL. ENVTL. L.J. 89 (1991).

Gifford, *Adjudication in Independent Tribunals: The Role of an Alternative Agency Structure*, 66 NOTRE DAME L. REV. 965 (1991).

Hillock, *Arbitration Of Title VII and Parallel State Descrimination Claims: A Proposal*, 27 CAL. W.L. REV. 179 (1990/1991).

Kerner, *Federal Courts Lack the Power to Consolidate Arbitration Proceedings Baesler v. Continental Grain Co., 900 F.2d 1193 (8th Cir. 1990)*, 69 WASH. U.L.Q. 349 (1991).

Saphire, *Reconsidering the Public Forum Doctrine*, 59 U. CIN. L. REV. 739 (1991).

Shell, *Opportunism and Trust in the Negotiation of Commercial Contracts: Toward a New Cause of Action*, 44 VAND. L. REV. 221 (1991).